

JUDGE SCHOFIELD

21 CV 07165

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BLACKBOARD INC.,

Movant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Respondent.

Civil Action No.

**AFFIDAVIT OF GINA DEL TATTO IN SUPPORT OF BLACKBOARD'S
APPLICATION AND MOTION TO VACATE OR MODIFY IN PART, AND TO
CONFIRM IN PART, THE ARBITRATION AWARD**

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

GINA DEL TATTO, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and an associate in the law firm of Mayer Brown LLP, counsel for Blackboard Inc. ("Blackboard") in this action.

2. I submit this Affidavit in support of Blackboard's Application and Motion to Vacate or Modify in Part, or to Confirm in Part, the Arbitration Award ("Motion to Vacate") and to place before the Court true and correct copies of the following documents referenced in Blackboard's Motion to Vacate and accompanying Memorandum in Support of the Motion to Vacate. I have personal knowledge of the facts set forth herein.

3. The true and correct copies of the documents referenced in Blackboard's Motion to Vacate and accompanying Memorandum are as follows:

4. Annexed hereto as **Exhibit A** is a true and correct copy of the arbitrators' May 27, 2021 Final Award for American Arbitration Association ("AAA") Case #: 01-19-003-0863.

5. Annexed hereto as **Exhibit B** is a true and correct copy of the May 28, 2021 Letter from the AAA delivering the Final Award to the parties.

6. Annexed hereto as **Exhibit C** is a true and correct copy of the Arbitration Agreement between Movant Blackboard and Respondent International Business Machines Corporation ("IBM"), dated June 28, 2019.

7. Annexed hereto as **Exhibit D** is a true and correct copy of Blackboard's Proposed Findings of Fact, submitted to the arbitrators on April 16, 2021.

8. Annexed hereto as **Exhibit E** is a true and correct copy of Blackboard's Proposed Conclusions of Law, submitted to the arbitrators on April 16, 2021.

9. Annexed hereto as **Exhibit G** is a true and correct copy of IBM's Proposed Findings of Fact and Conclusions of Law, submitted to the arbitrators on April 16, 2021.

10. Annexed hereto as **Exhibit I** is a true and correct copy of the Transcript of Day 1 of the Arbitration Hearing, dated March 1, 2021.

11. Annexed hereto as **Exhibit J** is a true and correct copy of the Transcript of Day 2 of the Arbitration Hearing, dated March 2, 2021.

12. Annexed hereto as **Exhibit M** is a true and correct copy of the Transcript of Day 5 of the Arbitration Hearing, dated March 9, 2021.

13. Annexed hereto as **Exhibit N** is a true and correct copy of the Transcript of Day 6 of the Arbitration Hearing, dated March 10, 2021.

14. Annexed hereto as **Exhibit O** is a true and correct copy of the Transcript of Day 7 of the Arbitration Hearing, dated March 11, 2021.

15. Annexed hereto as **Exhibit P** is a true and correct copy of the Transcript of Day 8 of the Arbitration Hearing, dated March 15, 2021.

16. Annexed hereto as **Exhibit Q** is a true and correct copy of the Transcript of Day 9 of the Arbitration Hearing, dated March 16, 2021.

17. Annexed hereto as **Exhibit R** is a true and correct copy of the Transcript of Day 10 of the Arbitration Hearing, dated March 18, 2021.

18. Annexed hereto as **Exhibit S** is a true and correct copy of Blackboard's Request for Proposal: Managed Hosting Services dated December 21, 2015 (BBX 254).¹

19. Annexed hereto as **Exhibit T** are true and correct copies of an Email from T. Gallagher to P. George and others, dated March 17, 2016, with the subject line "Updated IBM Price - Legacy and Cloud Flexible Pricing," along with the attachment "Pricing IBM Update 3-17.xls" (BBX 12).

¹ Exhibits at the arbitration hearing were marked with prefix "BBX" for documents originating from Blackboard's Exhibit List and "IBMX" for documents origination from IBM's Exhibit List. Each party used documents from the other's Exhibit List at the arbitration hearing. Only Exhibits admitted by the arbitrators at the hearing are included in this Affidavit and referenced in Blackboard's Motion to Vacate and accompanying Memorandum of Law.

20. Annexed hereto as **Exhibit U** is a true and correct copy of an instant messaging chat log between C. Sweeney and F. Yuan dated December 3, 2017 (BBX 344).

21. Annexed hereto as **Exhibit V** is a true and correct copy of an Email from C. Sweeney to B. Wood, R. Serino, I. Bashir, and S. Kapadia dated February 6, 2017, with the subject line “FW: Equivalency and AWS migrations” (BBX 223).

22. Annexed hereto as **Exhibit W** is a true and correct copy of the Master Professional Services Agreement (“the Contract”) executed on June 9, 2016 (BBX 429). Due to the size of the digital copy of the file, Exhibit W has been subdivided as follows:

- i. **Exhibit W-1** is a true and correct copy of the body of Contract (pages 1-130 of BBX 429);
- ii. **Exhibit W-2** is a true and correct copy of the Exhibits to the Contract (pages 131-400 of BBX 429);
- iii. **Exhibit W-3** is a true and correct copy of the entire Supplement No. 1 to the Contract (pages 401-670 of BBX 429).

23. Annexed hereto as **Exhibit X** is a true and correct copy of the Contract, Supplement No. 1, Schedule D, executed June 9, 2016 (BBX 134).

24. Annexed hereto as **Exhibit Y** is a true and correct copy of an Email from C. Xu to S. Kapadia, C. Sweeney, and others dated June 20, 2017, with the subject line “RE: Working Session on Process of Equivalency & Quantification” (BBX 1010).

25. Annexed hereto as **Exhibit Z** are true and correct copies of an Email from C. Sweeney to P. Kapiszewski dated August 9, 2017, with the subject line “File for Equivalency Discussion,” along with the attachment “Equivalency Spreadsheet for discussion Aug 10.xlsx” (BBX 70).

26. Annexed hereto as **Exhibit AA** are true and correct copies of an Email from R. Gwin to C. Sweeney dated August 7, 2018, with the subject line “Re: options,” along with the attached PowerPoint presentation (BBX 1533).

27. Annexed hereto as **Exhibit BB** is a true and correct copy of the designated portions of the transcripts of the first and second depositions of IBM Project Executive on the Blackboard account, Catharine Sweeney, played by video and entered into the Arbitration Hearing record on March 16, 2021.

28. Annexed hereto as **Exhibit CC** is a true and correct copy of an Email from E. Costa de Oliveira to C. Sweeney and others, dated August 24, 2017, with the subject line “Blackboard – Amendment 16 Fully Executed/Signed,” with attachments consisting of executed copies of Amendment 16 to the Contract (BBX 1316).

29. Annexed hereto as **Exhibit DD** is a true and correct copy of an Email chain from C. Sweeney to R. Gwin dated August 7, 2018, with the subject line “Re: options” (BBX 347).

30. Annexed hereto as **Exhibit EE** is a true and correct copy of an IBM Email chain between C. Sweeney, R. Gwin, and S. Kapadia dated August 7, 2018, with the subject line “Re: IBM Cloud Pricing” (BBX 346).

31. Annexed hereto as **Exhibit FF** is a true and correct copy of a PDF-version (as produced by IBM) of a spreadsheet dated June 21, 2019 (IBMX 5387).

32. Annexed hereto as **Exhibit GG** is a true and correct copy of an IBM Email chain between C. Sweeney, A. Zhu, and R. Lewis dated August 1, 2016, with the subject line “Re: base cloud billing” (BBX 170).

33. Annexed hereto as **Exhibit HH** is a true and correct copy of Amendment No. 15 to the Contract, effective April 1, 2017, which includes the Amended Schedule D (Schedule D-15) and the Amended Schedule D, Attachment D.1 (Attachment D.1-15) (BBX 1255).

34. Annexed hereto as **Exhibit JJ** is a true and correct copy of the transcript of the designated portions of the deposition of IBM executive Chris Nicoletti, played by video and entered into the Arbitration Hearing record on March 11, 2021.

35. Annexed hereto as **Exhibit KK** is a true and correct copy of an IBM Instant Messaging chat log between C. Sweeney and E. Fung dated February 24, 2017 (BBX 345).

36. Annexed hereto as **Exhibit LL** is a true and correct copy of an Email from C. Sweeney to B. Finnican dated August 20, 2018, with the subject line “*IBM Confidential: Re: Fw: Troubled Accounts,” along with the attachment titled “GTS Troubled Account – Blackboard.pptx” (BBX 66).

37. Annexed hereto as **Exhibit MM** is a true and correct copy of a PowerPoint presentation titled “Equivalency Analysis Review” with cover date of

March 27, 2017 and transmitted by Email as an attachment to Exhibit NN on March 31, 2017 (IBMX 5182).

38. Annexed hereto as **Exhibit NN** is a true and correct copy of an Email from S. Kapadia to A. Cox dated March 31, 2017 (BBX 323), with the subject line “Equivalency,” attaching Exhibit MM. These documents were produced by IBM and are sequentially Bates-stamped.

39. Annexed hereto as **Exhibit OO** is a true and correct copy of an Email from S. Kapadia to A. Cox and others dated March 9, 2017, with the subject line “re: Equivalency & Decommission,” with an attachment titled “Equivalency Best Practices.docx” (BBX 34).

40. Annexed hereto as **Exhibit PP** is a true and correct copy of IBM Expert Witness Richard Wallace’s Direct Examination Demonstrative, presented at the Arbitration Hearing on March 15, 2021 (IBMX 5490).

41. Annexed hereto as **Exhibit QQ** is a true and correct copy of the Rebuttal Expert Report of IBM Expert Richard Wallace (BBX 1296).

42. Annexed hereto as **Exhibit RR** is a true and correct copy of Blackboard’s Closing Demonstrative (BBX 1511).

43. Annexed hereto as **Exhibit SS** is a true and correct copy of an Email from S. Rulau to L. Rhodes and others dated May 22, 2016, with the subject line “RE: Bb Schedule D (Pricing and Financial Terms) IBM Redline 05-22-2016 11:15am ET,” with the attachment “Blackboard – Schedule D (05.20.16) (IBM SQR 05-22-2016)REDLINE.docx” (BBX 18).

44. Annexed hereto as **Exhibit TT** is a true and correct of an Email from P. Kapiszewski to C. Sweeney dated November 12, 2018, with the subject line “October Invoice (BB1018B),” with an attachment titled “IBM_October_Payment_11.5.2018[3].xlsx” (BBX 1554).

45. Annexed hereto as **Exhibit UU** is a true and correct copy of Exhibit 1 to the Expert Report of IBM Expert Louis Dudney, dated September 11, 2020 (IBMX 5417).

46. Annexed hereto as **Exhibit VV** is a true and correct copy of a Letter dated June 16, 2021, from Blackboard to the arbitrators requesting modification of the Award pursuant to AAA Rule R-50.

47. Annexed hereto as **Exhibit WW** is a true and correct copy of the arbitrators’ Response to Blackboard’s Letter requesting modification of the Award pursuant to AAA Rule R-50.

48. Annexed hereto as **Exhibit XX** is a true and correct copy of an Email dated June 2, 2021 from IBM Counsel A. Sidrys to Blackboard Counsel C. Zarlenga with an attached computation of interest and demand to pay such interest. A portion of the Exhibit has been redacted because it reflects attorney work product. The remainder of the Exhibit is unmodified from the original.

49. Annexed hereto as **Exhibit YY** is the true and correct copy of the transcript of the designated portions of the deposition testimony of Stephen Andrew (Andy) Cox, played by video and entered into the Arbitration Hearing Record on March 2 and March 3, 2021.

50. Annexed hereto as **Exhibit ZZ** is a true and correct copy of a Letter transmitted by Email on July 15, 2021 from Blackboard Counsel C. Zarlenga to IBM Counsel A. Sidrys.

Dated: August 23, 2021

MAYER BROWN LLP

By: 

Gina Del Tatto

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Counsel for Blackboard Inc.

Subscribed and sworn to before me

This 23rd day of August, 2021



Notary Public

THOMAS J. BRENNAN

Notary Public, State of New York

No. 01BR5048229

Qualified in Dutchess County

Certificate Filed in New York County

Commission Expires _____

8/21/2025